IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH G. STOREY, JR., *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 20932

PETITION FOR REHEARING

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To the Honorable Walter Pope, Chief Judge, and Circuit Judges Walter Ely and Charles Merrill.

Appellant, Kenneth G. Storey, Jr., hereby petitions for a rehearing to reconsider the judgment entered in this action on December 5, 1966, for the following reason:

Counsel very respectfully suggests that there is a misapplication of law in the Court's Opinion. As clarification of the point is essential to Appellant's cause, counsel feels obligated, with all due respect to the Court's eminence, to call attention thereto.

I. The suggested misapplication is found on pages 6-8 of the Court's slip Opinion. It concerns the failure of the local board to reopen after the registrant filed certain new information. The Court's conclusion was that this was immaterial in that any error by the local board was rectified by the Appeal Board's *de novo* classification.

There is a vivid distinction between the cases cited by

the Court on page 8 of its Opinion and the present case. In the cases cited by the Court the local board committed some error in the process of classification *before* an appeal was taken. The alleged error was then taken before the Appeal Board by the *subsequent* appeal.

In Appellant's case the error relied upon took place after he appealed. Therefore the error was never presented to or passed upon by the Appeal Board.

The said error relied upon was that the local board *denied* the Appellant *due process* by failing to reopen his classification. This occurred when the Appellant filed new information, one point of which was that he now knew his job at Boeing was wrong, in his conscience's sight, and that he had terminated his job there (Govt. Ex. 1, p. 55). This was filed March 31, 1964, subsequent to his hearing with the local board of May 20, 1963 (Govt. Ex. 1, p. 10). Said information evidenced a change of status from I-A-O to I-O. Not being clearly frivolous, it demanded, at least, a reopening and a hearing. See cases cited, Appellant's Opening Brief, pp. 28, 29; *U. S. v. Burlich,* 257 F. Supp. 906, 910, 911 (1966).

The hearing that would have followed such a reopening would have been of major and commanding importance to the Appellant in that the local board could have visually observed him, considered his explanation for working at Boeing and thereby ascertained his true attitude of repentance and sincere change of heart in quitting his job at Boeing (Transcript of Dec. 6, 1965, pp. 35, 36). As this very Court said: "The Appeal Board . . . has no similar opportunity to judge of the genuineness, the sincerity and the extent of a registrant's conscientious objection to military service." *Franks v. U. S.,* 216 F. 2d 266, 270 (9th Cir. 1954).

As can be clearly seen, this error of refusing to reopen was never taken before the Appeal Board nor considered

by them, so it could not possibly be said that its action cured the error in question.

II. Neither was the local board's error obviated by the fact that the new information was also before the Appeal Board. This would be immaterial. The Regulations grant each registrant the right to have his claim or new information considered by two separate bodies — the local board and the Appeal Board. He is afforded two distinct opportunities of having his request granted. The consideration of information by the Appeal Board cannot usurp or supplant the right of a registrant to have his local board review his claim. The Regulations provide:

> "It is the *local board's responsibility* to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the *satisfaction of the local board.* The *local board* will receive and consider all information, pertinent to the classification of a registrant, presented to it." (32 CFR 1622. 1(c))

Please also see 32 CFR 1626.26(b); *Knox v. U. S.*, 200 F. 2d 389, 401, 402 (9th Cir. 1952); *Ayers v. U. S.*, 240 F. 2d 802, 809 (9th Cir. 1957) and *U. S. v. Craig*, 207 F. 2d 888, 891 (3rd Cir. 1953).

For an analogous situation where the registrant filed new information with the local board while his case was before the Appeal Board see *U. S. v. Henderson*, 223 F. 2d 421 (7th Cir. 1955).

III. Attention must also be directed to the fact that the Appellant did request a "reopening." This was in his letter in which he stated, "I appeal to you to grant my desired classification of I-O." (Govt. Ex. 1, p. 123). This was held to be tantamount to a request for a reopening in the case of *Wyman v. LaRose*, 223 F. 2d 849 (9th Cir. 1955). Please

also see *U. S. v. Craig*, 207 F. 2d 888, 891 (3 Cir. 1953); *Townsend v. Zimmerman*, 237 F. 2d 376, 378 (6th Cir. 1956); *ex parte Fabiani*, 105 F. Supp. 139, 148 (E. D. Pa. 1952).

IV. The Court summarily denied the application of Escobedo and Miranda on the grounds that the administrative proceedings for conscientious objectors is noncriminal in character. An analogous point is now pending on appeal before the United States Supreme Court: In application of Gault, 17 L.Ed.2d III. There a Defendant in a Juvenile Court proceedings was not advised of his rights regarding self-incrimination because the proceedings were considered noncriminal in nature.

It is suggested that the decision in the Gault case will be controlling on this point so it is requested that the Court withhold determination until the handing down of that decision.

Respectfully submitted,

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CERTIFICATION

Undersigned counsel certifies that this petition is not interposed for delay and that in his judgment it is well founded.

Dated: December 15, 1966

/s/Ralph K. Helge

Ralph K. Helge, *Attorney*